A JUSTICE FACTORY

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When the second-story man receives a fourteen-year sentence on his third conviction for burglary, he cries out that he has not had justice. When the stout lady loses her case against the trolley company, because she is guilty of contributory negligence, she says that there is no such thing as justice. For justice in the abstract is nobody's concern. Even the social economist talks too much about justice. The terms, "justice and the law," "the value of precedent," "the formulae of equity," "the social value and scope of courts," are abstract phrases which seem more appropriate to an eighteenth century school of thought than to modern conditions.

The concrete question is, "What is the demand and what is the supply?" The demand is for the settlement of civil disputes and for the punishment of the community offender, and the supply, the court machinery to meet it. It is not proposed to deal with the first, but the second. The separation of substantive and adjective law throws an interesting sidelight on court procedure. At first sight they seem to be inextricably mixed and the law used in finding out what happened often overshadows the real or substantive law.

There is a subtle humor in calling the law of procedure adjective or modifying. It is as though one were saying that possibly the adjective law might modify or materially change the substantive law. This may account for the reason that the courts are credited with not doing justice. It may be that they are more occupied in modifying than in applying the real law.

Substantial justice should be the same as the actual law, and actual law is the expression of the common sense of the community. This common sense is continually changing with changing conditions. If courts of justice were readily adjustable to social conditions, there would be no complaint about the courts. But the point of difference between substantial justice as applied in the courts and the common sense of the community, is the question of procedure. The courts in applying common sense to particular facts have necessarily formu-

lated rules and methods of application. By the time these rules are successfully working the substantive laws themselves have often changed, and the method of procedure has become in the meanwhile ill-adapted. Thus always are they one step behind the common sense or justice of the community.

When new conditions arise in manufacture—a new style of goods, new demands, change in labor or the invention of new machinery—the factory that has been working for years on the same basis must be radically changed and new methods adopted. Much of the machinery must be sent to the scrap heap. Manufactured goods are thrown away and new ones made according to modern market demands. Courts, in the administration of modern justice, are nothing after all but government factories.

All talk about respect for courts and the dignity of the bench may be a trifle overdrawn, and in a civilized democracy seems a little like the talk about "The Divine Right of Kings." In every other condition of life, a false importance of office is smiled at. In this age of frankness we do not expect such dignity of demeanor from anyone, except from the courts and judges. The President of the United States may go every day in the week to play golf or to attend a ball game, but no judge of the Supreme Court could frequently sit in the bleachers with popular approval. As a matter of fact, why should not the justice of the Supreme Court be as simple on the bench as he wants to be in private life?

Is there not a grave question in presuming too much as to this divine right of courts? What does the dignity of courts amount to? Is it necessary to impress the populace? Do pomp and formality increase the respect for authority? The respect does not come from uniforms or knee breeches. If it did, the car conductor and liveried flunkey were entitled to more.

There is undoubtedly a real respect and admiration for the courts, perhaps an innate feeling for abstract justice, but it is questionable whether it is more than respect for ultimate authority. The courts represent the concrete idea of supreme and final determination. "Unless there were courts," says the man on the street, "justice would be sought with a knife." Disputes must be settled and criminals punished, so apparently courts are necessary evils existing to satisfy the unlawful. A place and opportunity to fight seem also to be the demand, as though not so much justice were

demanded as that very arena for battle. This may explain the popular appeal of the courts and why there is supposed to be a romance or drama therein. Perhaps the public interest is not founded so much on the allurement of battle as on the interest of human character therein developed.

In the criminal courts, the method of arriving at justice in the form of a legal battle is not a very high ideal. It is supposed to be a fair fight between the criminal on the one hand and the state on the other, with the judge as the arbiter and the jury as the restraining influence protecting the public right. Although it is supposed to be a fair fight with even chances on each side, it is not so in reality. It is rather a miserable picture to imagine a criminal as fighting for his life. Corner a rat and of course he will fight somewhat. A criminal caught in the trap of the law cannot have a fair fight if the court is considered as giving him only an opportunity for a fair struggle. It is true that the criminal may employ counsel, if he can afford to pay. If he cannot afford to pay, the court will appoint one for him and he is supposed to be thankful to the judge even for an inexperienced and unoccupied legal champion.

Actually, what chance has he? The idea that a criminal trial is one great, grand battle between the state and its prosecuting attorney with enormous resources of wealth, power, etc., and the criminal, is absurd. The criminal has no money; his name is already besmirched; his lawyer is apt to have had little experience or be of doubtful reputation. He has little opportunity of discovering or securing witnesses, and no corps of detectives, legal service or assistance.

The very presumption of law is inconsistent. Under the English law the criminal is presumed to be innocent until he is proved guilty, and the odds are theoretically in his favor. He must be proved guilty beyond a reasonable doubt. So the law states, but in reality the chances are not even equal but are against the criminal. The fact that he has been indicted already prejudges him as guilty in the mind of the community. The judge, the jury and the public at large presume him to be guilty. They ask, "If he did not commit the crime, how did he come to be in court?" Everyone knows that the grand jury that has indicted him is composed of eminent citizens. The district attorney who caused his indictment was only elected last fall by large popular vote. It is impossible to

believe that he would try to railroad him to jail or be persecuting an innocent man. The fact of the matter is, the man is probably guilty, and what the judge and jury are there for is to make sure. The presumption of public opinion in spite of the presumption of law has almost convicted the criminal before he begins his supposed fair fight in court.

In a civil action, the inconsistency of court procedure is not quite so obvious; the two sides are arrayed one against the other, the judge is placed as umpire and accorded a quantity of circumstance. He is supposed to be endowed with an almost inhuman aloofness. The jury, often unwilling umpires, sit by to see that justice is done. Although willing to do their duty, they are anxious to be through with an inconvenient call of citizenship. They are not the best possible cojudges. The lawyers are opposed to one another as armed and paid contestants. The clients ill at ease are not particularly pleased at the many delays and technicalities of the trial. The witnesses, having been harrassed and confused, instead of being disinterested bearers of the truth may become unwilling and annoyed partisans.

During the trial or struggle the little technicalities, motions and exceptions bear a great similitude to a legal battle or an intellectual game. When the testimony is over, the two lawyers exhibit before the clients and jury their fighting capacity in words. Then the judge gravely charges the jury that it has been a fair battle, and that on the one side so many blows have been struck and on the other such and such counterattacks have been effective. After it is over and the battle ended, the jury go behind locked doors, pull out their pipes or cigars, forget about the ordeal and try to settle the matter on a business basis. The verdict may not always be according to law, especially that strict application of law as laid down by the judge, but the jury make allowance for the technicalities and anomalies of the trial and their decision is based on common sense.

The entire relation of courts to the community is not well adjusted in form or in the theories of trials. They are survivals of usages called forth by the economic conditions of a past age. When commercial and social life was on a simpler basis, and the courts occupied the position in the political structure as bulwarks for the protection of popular rights against tyranny and oppression "trial by one's peers," "due process of law," "the right of trial by jury,"

were noble phrases. There may be a question as to their present-day value. In a democracy are they more than sentimental?

The courts as instruments for the preservation of liberty are somewhat inept, and they are not any longer the necessary guardians of public freedom. Take away this quality of the overdrawn majesty of courts and there are removed many of the characteristics which awaken criticism. The majesty of the law and the form and state of the judiciary are antiquated ideas. Law may be the ultimate authority, but the courts which enforce it do not need stage costumes or setting. It is a question whether the power of the law is increased by the state and circumstance of courts. Perhaps in the police court, the small offender should be taught to shiver before the majesty of the law, but why, in civil court, should the client and witnesses be overcome with fright?

Hearings of the court are properly public; but why insist on this as a protection of public civil rights? It is no longer necessary and the physical conditions are not well adapted. The judge and the witness are far removed from the audience. Only scraps of testimony can be heard. In the present day of the ubiquitous reporter, there is little danger of star chamber proceedings.

As a painter seeking a landscape walks over the countryside and suddenly stops, spreads his legs, bends down and looks between them at the picture upside down, so new values may be obtained from an inverted point of view. Suppose the parties were brought into court with no funereal formality, but by being told to come over the telephone or by a postal card or any other method which satisfied the court they had been notified. When the parties or clients came there might be this important difference between the future courts and those of the present day. The clients and their witnesses would be the important people and to be considered first rather than the judges, the jury or the lawyers.

The clients have come to court because they want something settled. They are the people for whom the courts exist, not the judge, the jury, the court attendants or the lawyers. They are entitled to every courtesy and consideration, for it is primarily their court. They ought to be made comfortable and easy. Everything should be done to definitely settle their disputes. The law and majesty of court procedure are only incidentals. The immense

we would do well to abrogate before becoming entangled by their provisions in serious international embarrassments.

The *Tageblatt*, of Berlin, a recognized government organ, has commented upon President Wilson's war message of April 2, by saying:

> We realize now what a big mistake it was that German policy saw fit to refuse to conclude the Bryan peace treaty such as England and other powers entered into with the United States. If such a contract existed today the United States would be compelled to submit even the gravest differences to a court or arbitration before breaking relations. This would mean gaining at least a year. It is not at all impossible that President Wilson in his embarrassment would have taken that course to get away from the serious position into which his one track policy has led him.[1]

This expression pointedly calls attention to the possible effect upon our national interests of the series of treaties which under the pacifistic emotionalism of William Jennings Bryan, when Secretary of State, the United States was induced to promote and enter into with most of the European countries (with the exception of Germany, Austria and Turkey),[2] with many of the South and Central American countries,[3] and with China. These treaties, ratified by the Senate during the years 1914 and 1915, committed the United States to submit all disputes which may arise between the contracting parties concerning questions of an international character, which cannot be solved by direct diplomatic negotiation and are not embraced in the terms of any treaty of arbitration in force between them, to a commission for investigation and report, with the agreement that the parties will not declare war or begin hostilities pending the investigation and report of such commission. Chile and Uruguay reserved from the operation of the agreement questions affecting their vital interests, and in the case of Uruguay, those affecting its honor. Previous to Mr. Bryan's advent in the state department, the United States had been foremost in the extension by treaty of the principle of deciding by arbitration all disputes with foreign nations justiciable in their nature and not involving matters purely of national policy.

[1] *New York Times*, April 5, 1917.

[2] That is with France, Great Britain, Spain, Russia, Italy, Norway, Sweden, Denmark, Portugal.

[3] Peru, Paraguay, Uruguay, Ecuador, Bolivia, Guatemala, Costa Rica, Honduras, Haiti.

The Senate of the United States always had been careful to preserve its prerogative under the Constitution of ratifying or concurring in the making of every treaty negotiated by the President, and in consenting to the ratification of the convention for the pacific settlement of international disputes formulated at the Hague Conference of 1907, the Senate expressly resolved that:

> Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

The resolution further recited that the approval of the convention was given with the understanding that recourse to the permanent court for the settlement of differences could be had only by agreement thereto, through general or special treaties of arbitration theretofore or thereafter concluded between the parties in dispute.

Following the Hague Conference of 1907, arbitration conventions were entered into with Great Britain and France, dated August 3, 1911, each of which provided as follows:

> All differences hereafter arising between the high contracting parties which it has not been possible to adjust by diplomacy, relating to international matters, in which the high contracting parties are concerned by virtue of claim of right made by one against the other, by treaty or otherwise, and which are justiciable in their nature, by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted

to arbitration under the provisions of the convention. In order that there might be no possible doubt as to the meaning of these words, the Senate, in ratifying the treaties, did so upon the expressed understanding

> to be made part of such ratification that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States or the territorial integrity of the several states or of the United States, or concerning the question of the alleged indebtedness or moneyed obligations of any state of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy.

Perhaps one of the strongest motives which led to this careful avoidance of committing the United States to arbitrate, or submit

to investigation by a commission, questions purely of national policy, lay in the determination, which certainly during nearly a century and until the year 1913 controlled the action of the American government, under whatever political administration, that the Monroe Doctrine was a definite policy of the United States, which it had itself adopted as essential to its national interests, and which it would not consent to submit to question by any other power. The excessive zeal of Secretary Bryan to make it impossible under any conditions for the United States to enter upon war, led to the abandonment of this salutary principle of national protection in the twenty odd treaties negotiated by him in 1913 and 1914 above referred to. Some students of those treaties and their effect already have maintained that they bind the United States to submit to arbitration even disputes which may involve the Monroe Doctrine under the provisions of those compacts.

Fortunately for us, as the Berliner *Tageblatt* has pointed out, Germany and her allies did not accept Mr. Bryan's invitation to enter into similar agreements with us, nor has Japan or Mexico done so. It is my belief that there are some questions which no nation can afford to submit to the determination of any outside tribunal, and there are some questions which cannot be submitted even to a commission of inquiry for consideration under an agreement that war shall not be made until the commission of inquiry submits its report. The present controversy with Germany affords a striking example of that fact. The final issue upon which we have broken with Germany is with respect to her right to wage a submarine warfare against all neutral vessels, our own included, which penetrate a zone drawn by her about the British Islands and the coast of France. Had she been a party to one of these Bryan treaties, we should have been bound by the treaty to submit to a commission appointed in accordance with the treaty the question whether or not Germany was justified in the adoption of her submarine policy, or if we were justified in considering it a *casus belli*. The commission would have had one year within which to make an investigation, and Germany, continuing her submarine warfare, would have disclaimed our contention that she was making war upon us, averred that she was merely pursuing a method of war against the allied powers, and maintained that we could avoid all injury to our interests by keeping our ships away from the prohibited zone. This being the dis-

puted point required to be submitted to a commission, would have prevented us from forcibly protecting our own interests, except at the cost of violating our treaty obligations. Under such conditions, it is more than probable we should have proceeded against Germany despite the treaty, and perhaps the most objectionable feature of these universal Bryan treaties is that they will inevitably tend to a breach of their own provisions under stress of circumstances.

That it is by no means an idle surmise that even the American government might disregard a treaty obligation which was found to be embarrassing, is demonstrated by the action of our state department within the past few months concerning the treaty negotiated by Secretary Bryan with Nicaragua. The facts of this case ought to be more widely known by the American people. On August 5, 1914, a convention or treaty was entered into between the United States and Nicaragua, known as the Bryan-Chamorro treaty, whereby Nicaragua ceded to the United States certain rights for the construction of a ship canal across the so-called Nicaraguan route, and in order to enable the government of the United States to protect the Panama Canal and the proprietary rights granted in connection with the canal route across Nicaragua, Nicaragua further leased for ninety-nine years to the United States government certain islands in the Caribbean Sea and granted the right to the United States during that period to maintain a naval base on the Gulf of Fonseca on the Pacific side, with the right to a renewal of such lease and occupation for a further term of ninety-nine years. Costa Rica, Salvador and Honduras protested against this treaty upon the ground that it impaired their existing sovereign rights with respect to the waters and territory embraced within the concessions. The claims of Costa Rica were particularly strong being founded upon an award made by President Cleveland in March, 1888, as arbitrator of a dispute between Costa Rica and Nicaragua. The United States Senate, in ratifying the treaty, adopted a resolution declaring that nothing therein contained was intended to affect any existing right of any of the above named states. But this declaration did not satisfy either of them, and accordingly they appealed to the Central American Court of Justice, a species of Hague Tribunal, which Mr. Root when Secretary of State procured to be established in Central America, some ten years ago, for the purpose of furnishing a means of settling without war questions